DISTRICT COURT, PUEBLO COUNTY, STATE OF COLORADO 501 N. Elizabeth St. Pueblo, CO 81003	DATE FILED: May 10, 2019 4:18 PM FILING ID: 6733390E95634 CASE NUMBER: 2019CV30298
PUEBLO EDUCATION ASSOCIATION; SUZANNE ETHREDGE; and ROBERT DONOVAN Plaintiffs, **v.** **COLORADO STATE BOARD OF EDUCATION and PUEBLO SCHOOL DISTRICT NO. 60 BOARD OF EDUCATION,** Defendants.	**▲COURT USE ONLY▲** Case Number: Courtroom:
Attorneys for Plaintiff: Kris Gomez, #28039 Brooke M. Copass, #45044 Erik G. Bradberry, #49894 COLORADO EDUCATION ASSOCIATION 1500 Grant Street Denver, Colorado 80203 Phone: (303) 837-1500 Fax: (303) 861-2039 kgomez@coloradoea.org bcopass@coloradoea.org ebradberry@coloradoea.org	

MOTION FOR A PRELIMINARY INJUNCTION

The Plaintiffs, Pueblo Education Association ("PEA"), Suzanne Ethredge ("Ms. Ethredge"), and Robert Donovan ("Mr. Donovan"), by and through counsel, respectfully move this Court to issue a Preliminary Injunction pursuant to C.R.C.P. 65(a) to enjoin enforcement of the Defendant Colorado State Board of Education's ("the State Board") November 27, 2018 Order and its April 10, 2019 action approving a private entity to wholly manage Risley Internation Academy of Innovation ("Risley"). In addition, the plaintiffs respectfully ask this Court to preliminarily enjoin the Defendant Pueblo School District No. 60 Board of Education

("the Local Board") from delegating any non-delegable authority it possesses, and from performing under the contract it has entered into with a private management entity in a manner inconsistent with the Colorado Constitution and applicable state law. This Motion for Preliminary Injunction is filed simultaneously with the plaintiffs' Complaint and Request for Delcaratory Relief. The Plaintiffs request that this matter be heard forthwith pursuant to C.R.C.P. 121, § 1-15, 4. In support of this Motion, the Plaintiffs state the following:

C.R.C.P. § 121, 1-15, 8 – Duty to Confer

Counsel for the Plaintiffs have conferred with counsel for the State Board regarding this motion. Counsel for the State Board opposes the relief herein sought. Plaintiffs' counsel attempted to confer, via electronic mail, with counsel for the Local Board. Counsel for the Local Board has not yet indicated its position on this Motion.

MATERIAL FACTS

On November 27, 2018, the State Board ordered the Local Board to, *inter alia*, (a) identify a new external management partner; (b) present that external partner to the State Board for approval; and, if approved (c) enter into a contract with that external partner to "wholly manage [the school] for a period of not less than four years." *Exhibit 1, State Board November 27, 2018 Order*. The State Board's Order gave the Local Board ninety (90) days to identify a public or private entity, other than the School District, to wholly manage Risley. *Id.*, p. 9. Once the Local Board selected a manager that met the State Board's criteria and received formal approval from the State Board to proceed with that manager, the Local Board had thirty (30) days to "execute a contract authorizing the selected and approved manager to administer the affairs and programs of the school beginning no later than July 1, 2019, and continuing for a term of not less than four years." *Id.*

The Order required that the contract between the Local Board and the manager include a term providing that "the manager ... manage the school[] in a full-time capacity" and that "the local board ... delegate to the manager all authority needed to fully manage [the] school[.]" *Exh. 1, p. 9.* In short, the State Board required that the Local Board enter into a contract, and as part of that contract waive its constitutional power of "local control" over instruction.

Additionally, the State Board's Order required the Local Board to assign critical duties that Pueblo voters elected its members to fulfill to an entity that most of those voters have never heard of and which is not authorized by law to execute the powers delegated to it. The duties the Local Board is required to delegate include, but are not limited to, the following:

a. Building-level personnel and staffing;

b. Professional development and training of teachers and other staff;
c. Implementing an instructional program;
d. Identifying needs for additional consulting and professional services, including whether to continue the partnership with ANet;
e. Revising the school's innovation plan;
f. Creating, changing, and guiding systems aimed at modifying the school's climate and culture;
g. Management of the school's budget; and
h. "Other authority" the outside manager might reasonably need.

Exh. 1 pp 10-11.

The Order restricts the Local Board's ability to terminate the contract with the external manager by requiring the Local Board to show "good cause" before it would allow the Local Board to end its contractual relationship with the manager. *Id., p. 11.* The State Board further requires that the Local Board provide a copy of the contract between the Local Board and the external manager to the Commissioner of Education ("Comissioner"), so that the Commissioner may "advise the State Board in the event that the contract fails to satisfy the terms of [the] Order." *Id.*

Despite the above-described disregard for the constitutional and statutory powers the Local Board possesses, the State Board recognized that some actions require formal action by local boards of education—hiring and firing of teachers is a prime example. To surpass this hurdle, the State Board ordered the Local Board to "give appropriate consideration to the recommendations of the manager and not unreasonably withhold [its] approval." *Exh. 1, p. 11.* Any rejection of a manager's recommendation over a matter requiring formal action by the Local Board would have to be accompanied by "a reasoned, written explanation" submitted to the Department of Education. *Id.* Moreover, any "[u]nreasonable rejection of the manager's recommendations, or a pattern or practice of rejecting the manager's reasonable recommendations, may constitute evidence of noncompliance with [the] Order." *Id.*

On March 12, 2019, the Local Board unanimously selected MGT of America Consulting, LLC ("MGT") and the University of Virginia Darden/Curry Partnership for Leaders in Education ("PLE") to wholly manage Risley. Pursuant to the State Board's November 2018 Order, the selection could not be finalized unless and until the State Board gave its approval. On April 10, 2019, the Local Board presented its selection of MGT/PLE to the State Board. Following public presentations, the State Board approved the Local Board's selection of MGT/PLE.

On April 11, 2019—the day after the State Board gave its approval for MGT to manage Risley—the Local Board convened a meeting to formalize its agreement with MGT. The

contract between the Local Board and MGT provides, *inter alia*, that the Local Board "shall delegate to MGT all authority needed to fully manage Risley," and that MGT's authority will include, but not be limited to, the following areas:

i. **Building-level personnel/staffing** – Pursuant to the contract, MGT "shall have authority over recruitment, selection of staff and assignments of all personnel required to maintain the operations and carry out the educational programs of the school; additionally, the manager shall supervise and evaluate the building principal."

j. **Professional development and training** – Pursuant to the contract, MGT's authority "should include selecting and scheduling teacher professional development and mentoring administrators, including by providing coaching around instructional observation and feedback."

k. **Implementing an instructional program** – The contract provides MGT the sole authority to"….include adopting/revising curriculum and assessment systems."

l. **Identifying needs for consulting and professional services** – which includes MGMT's sole authority to decide whether to retain ANet as a partner;

m. **Revising innovation plans** – which provides MGT's sole responsibility "for implementation of the school's innovation plans, including fully leveraging the plans as currently approved and recommending any further waivers needed to optimize student outcomes."

n. **School climate and culture** – which grants MGT exclusive authority to create, change, and guide school-wide systems at Risley.

o. **Budgetary discretion** – The contract provides that MGT "shall have authority to manage the school's budget adopted by the local board, including state and federal grant dollars that are allocated to the school by the local board." Risley's budget also includes, on information and belief, locally-raised funds allocated to the school.

p. **Other authority** – The Local Board ceded blanket authority "as the manager reasonably needs to create systemic improvement in teaching and learning."

Exhibit 2, External Management Agreement, pp. 1-2 (April 11, 2019). The Local Board also committed to "not unreasonably" withhold its approval of recommendations MGT might make

regarding actions requiring formal action by the Local Board. *Id., p. 2.* Although the contract between the Local Board and MGT is not scheduled to take effect until July 1, 2019, MGT is already making critical determinations pursuant to its delegated authority. For example, MGT executives recently polled teachers at Risley to find out which of them intend to remain at the school for the 2019-20 school year. Those who responded that they do intend to remain at the school, including plaintiff Robert Donovan, were forced to "interview" with two MGT executives who, in turn, would determine whether the teacher would be permitted to remain at the school. Mr. Donovan's interview took place on or about May 7, 2019; as of the date of this motion, the MGT executives have not communicated their decision to Mr. Donovan, nor to any other teacher who interviewed in an effort to keep their positions. For those not selected, as discussed in greater detail below, the prospects are bleak and include nonrenewal of their contract (i.e. termination of their employment), displacement (which can lead to a teacher being placed on unpaid leave), and searching for a job during the summer months (i.e. when most school districts have already filled positions for the coming school year).

STANDARD OF REVIEW FOR GRANTING A PRELIMINARY INJUNCTION

A party seeking a preliminary injunction must establish: 1) a reasonable probability of success on the merits; 2) a danger of real, immediate and irreparable injury which may be prevented by injunctive relief; 3) lack of a plain, speedy and adequate remedy at law; 4) no disservice to the public interest; 5) a balance of the equities in favor of granting injunctive relief; and 6) preservation of the status quo pending a trial on the merits. *Rathke v. MacFarlane,* 648 P.2d 648, 653-654 (Colo. 1984). In addition, § 24-4-106(8), C.R.S., permits a court to enjoin "the conduct of any agency proceeding in which the proceeding itself or the action proposed to be taken therein is clearly beyond the constitutional or statutory jurisdiction or authority of the agency" upon a showing of irreparable injury.

Pursuant to § 24-4-106(5), C.R.S., a reviewing court shall "[u]pon a finding that irreparable injury would otherwise result, the agency shall postpone the effective date of the agency action pending a judicial review, or the review court, upon application therefore, …, shall issue all necessary and appropriate process to postpone the effective date of the agency action or to preserve the rights of the parties pending conclusion of the review proceeding."

ARGUMENT

1. Probability of Success on the Merits

a. Probability of Success on the Merits Against the State Board

The Plaintiffs are likely to succed on the the merits of its case because the actions by the State Board acted in a manner that is arbitrary or capricious; a denial of a statutory right; contrary to a constitutional right, power, privilege or immunity; in excess of its statutory jurisdiction, authority, purposes or limitations; not in accord with procedures or procedural limitations; an abuse of discretion; or otherwise contrary to law. § 24-4-106(7)(b), C.R.S. In support thereof, the Plaintiffs state the following:

i. The State Board exceeded its constitutional authority.

Article IX, § 1 of the Colorado Constitution vests the State Board with the powers and duties necessary for the general supervision of the public schools. The Colorado Supreme Court defines this constitutional grant of "general supervision" as allowing the State Board "to provide direction, inspection, and critical evaluation of 'the whole' in the sense of contributing a statewide perspective to decisions affecting public schools" and that the State Board is to serve as a "conduit for information regarding the school system's present state and as a source of ideas, recommendations and aspirations for its improvement." *Bd. of Educ. v. Booth*, 984 P.2d 639, 647-48 (Colo. 1999) (emphasis added).

The notion of "general supervision" has not evolved greatly since Colorado became a state. In 1877, the General Assembly described the State Superintendent's supervisory responsibilities as including:

> [V]isit[ing] annually such counties in the state as most need his personal attendance and all counties, if practicable, for the purpose of inspecting the schools, awakening and guiding public sentiment in relation to the practical interests of education, and diffusing as widely as possible, by public addresses and personal communication with school teachers and parents, a knowledge of existing defects, and of desirable improvements in the government and instruction of schools.

Booth, at 647 (*citing* Colo. G.L. 2456, 10).

One hundred forty-two (142) years later, the General Assembly notes that the Commissioner of Education is tasked with, among other duties:

> [V]isit[ing] public schools and communities which most need [her] personal attendance for the purpose of stimulating and guiding public sentiment to education and diffusing ... a knowledge of existing defects of and a knowledge of desirable improvements in

> the government, finance, curriculum of, and instruction in the public schools.

§ 22-2-212, C.R.S.

After nearly one hundred fifty (150) years, "general supervision" continues to mean that the State Board is to serve as a "conduit for information regarding the school system's present state and as a source of ideas, recommendations and aspirations for its improvement." *Booth*, 647-48 (emphasis added).

The State Board's power of "general supervision" should be read in harmony with the constitutional authority vested in local boards of education. Article IX, § 15 of the Colorado Constitution ("the Local Control Provision") provides that local school boards "shall have control of instruction in the public schools of their respective districts." The Colorado Supreme Court added clarity to the ideas of "control" and "instruction" in *Booth*, noting that "control of instruction requires power or authority to guide and manage both the action and practice of instruction as well as the quality and state of instruction." 984 P.2d at 648. The *Booth* Court summarized earlier cases interpreting the Local Control Provision as requiring "substantial discretion regarding the character of instruction that students will receive at the district's expense." *Id.*

The State Board's November 27, 2018 Order decimated judicial interpretations of "local control" by, for example, requiring the Local Board to select a manager to "manage the school[] in a full-time capacity" and by demanding that the Local Board was to "delegate to the manager all authority needed to fully manage [the] school[.]" This delegation was to include ceding decision-making authority over matters such as staffing, training, implementing the instructional program, revising the school's innovation plan, and managing the school's budget. The State Board even required the Local Board to give over such "other authority" as the manager might need to perform the functions that Pueblo voters elected their school board members to fulfill. Under the State Board's Order, the Local Board was left with no discretion—let alone "substantial" discretion—regarding the character of instruction students at Risley would receive in the coming school years. *Booth*, at 648.

Needless to say, the State Board went much further in this case than providing ideas, recommendations, and aspirations as to how the Local Board might spur meaningful and lasting improvement at Risley. *Booth*, 647-48. Rather, it dictated the terms by which the Local Board would be required to cede its authority to "guide and manage both the action and practice of instruction" at Risley. *Booth*, at 648. The vehicle by which the State Board required the Local Board to cede that authority took the form of a contract, which the State Board ordered the Local Board to enter into. The State Board mandated that the contract could only be terminated for

"good cause," and the Local Board was to "give appropriate consideration to the recommendations of the manager and not unreasonably withhold [its] approval" concerning issues that required formal action by the Local Board, such as hiring and firing teachers. Under the dictated contract, any rejection of a manager's recommendation over a matter requiring formal action by the Local Board would have to be accompanied by "a reasoned, written explanation" submitted to the Department of Education, and any "[u]nreasonable rejection of the manager's recommendations, or a pattern or practice of rejecting the manager's reasonable recommendations, may constitute evidence of noncompliance with [the] Order." Noncompliance was not something to be taken lightly, according to the State Board's November 2018 Order, for it could be met with severe consequences, such as conversion of Risley to a charter school or closure of the school altogether.

As alleged in the Complaint, the Local Board entered into a contract with MGT/PLE on or about April 11, 2019. Not surprisingly, the contract contained—essentially word-for-word—the material terms contained in the State Board's November 2018 Order. The magnitude of the State Board's overreach thus materialized—i.e. the November 2018 Order, while clear as to the the nature of power and authority the Local Board was expected to give up, was silent on the critical question of what compliance with the Order would cost the School District. The MGT/PLE contract, however was not silent on this term—the Local Board agreed to pay MGT/PLE up to $424,000 during the first year of the agreement.

The State Board thus wrote a check in November 2018 that the Local Board was forced to cash. This despite the well-established principle, recognized by the Colorado Supreme Court for over 100 years, that Art. IX, § 15 of the Colorado Constitution demands "that local school districts must retain control over any instruction paid for with locally-raised funds." *Owens v. Colo. Cong. Of Parents*, 92 P.3d 933, 935 (Colo. 2004) (referring to *Belier v. Wilson*, 147 P. 355 (Colo. 1915)). The *Owens* Court noted that "[c]ontrol over locally-raised funds allows local electors to tailor educational policy to suit the needs of the individual districts, free from state intrusion." 92 P.3d at 935. "Without control over locally raised funds, the representative body mandated by our state constitution loses any power over the management of public education." *Id.* at 935-36.

While the management contract between the Local Board and MGT/PLE identifies the amounts of money to be paid, it does not identify the source of those funds. At this early stage, the Plaintiffs have not had the benefit of any discovery that might shed light on that issue, but purposes of this motion, they have sufficiently stated a reasonable probability on the success of the merits of their constitutional claims and, as discussed below, the appropriate way to preserve the status quo includes enjoining any expenditure of locally-raised funds pending the outcome of the instant case.

ii. The State Board demanded that the Local Board assign non-delegable authority.

The powers and duties of local school boards are defined in Colorado statute. Section 22-32-109(1)(f)(I), C.R.S., states that local school boards have the power to "employ all personnel required to maintain the operations and carry out the educational program of the district." Local school boards also hold the power to "determine the educational programs to be carried on in the schools of the district and to prescribe the textbooks for any course of instruction or study in such programs." § 22-32-109(1)(t), C.R.S.

The question has arisen in Colorado whether certain powers, conferred exclusively on local boards of education, may be delegated to subordinate officers of a school district. In *Big Sandy Sch. Dist. v. Carroll*, 433 P.2d 325, 328 (Colo. 1967), the Court noted that, generally, quasi-municipal corporations such as public school districts may delegate powers and functions "which are ministerial or administrative in nature, where there is a fixed and certain standard or rule which leaves little or nothing to the judgment or discretion of the subordinate." However, powers vested in the school district by the general assembly "may *not* be delegated unless such has been expressly authorized by the legislature." *Id.* (emphasis in original).

Based on those principles, the *Big Sandy* Court concluded that the powers to employ teachers and fix their salaries "is not a mere ministerial or administrative matter, where little or no judgment or discretion is involved, but on the contrary is a legislative or judicial power involving the exercise of considerable discretion. Hence, under the general rule, such power cannot be delegated." 433 P.2d at 328. The Court reinforced its conclusion, noting that employing teachers is a power conferred by the legislature exclusively on local boards of education, and as such, "cannot be delegated." *Id.*

Worth noting, the legislature has authorized delegation of teacher employment to an innovation school, § 22-32-109(1)(f), C.R.S., which Risley is, but it has not expressly authorized delegation of teacher employment or other local board duties to a private, for-profit management entity.

Here, the State Board's November Order and subsequent contract entered into by the Local Board and MGT/PLE contemplate the Local Board assigning authority over, *inter alia*, "recruitment, selection of staff and assignments of all personnel required to maintain the operations and carry out the educational programs of [Risley]...." This attempted assignment of authority clearly implicates the Local Board's statutory authority to "employ all personnel required to maintain the operations and carry out the educational program" at Risley, and the legislature has not expressly authorized the Local Board to delegate this authority. The purported assignment of authority thus violates § 22-32-109, C.R.S., and is directly inconsistent with the Court's holding in *Big Sandy*.

b. Probability of Success on the Merits Against the Local Board

i. The Local Board's contract with MGT/PLE contains terms that are contrary to law.

Because the Local Board's contract with MGT/PLE is drafted to conform with the requirements imposed by the State Board's November 2018 Order, the contract suffers from many of the same legal frailties as the Order itself. The Local Board's contract notes, at Section IX.M (Partial Invalidity), that any provision of that agreement declared illegal or invalid for any reason is fully severable from the valid provisions.

Many provisions of the contract are illegal and invalid because they represent an attempt to delegate authority the Local Board is not permitted by law assign to any of its subordinates, much less to an external management company. Those provisions include, but are not limited to, (a) those assigning personnel and staffing decision-making responsibilities; (b) those assing authority to implement an instructional program; (c) those permitting MGT/PLE to revise innovation plans; and (d) those giving budgetary discretion to the external manager.

Other provisions compound the problems inherent in assigning non-delegable functions by committing public money—including locally-raised funds—to the external manager in exchange for performing the services the voters elected the Local Board to fulfill. *See* Annex No. 2 to the Local Board's contract, Section I (Budget and Compensation).

ii. The Local Board's contract with MGT/PLE violates § 22-32-109, C.R.S.

The powers and duties of local school boards in the state of Colorado are spelled out in Colorado statute. Section 22-32-109(1)(f)(I), C.R.S., states that local school boards have the power to "employ all personnel required to maintain the operations and carry out the educational program of the district." Local school boards also hold the power to "determine the educational programs to be carried on in the schools of the district and to prescribe the textbooks for any course of instruction or study in such programs." § 22-32-109(1)(t), C.R.S. The Local Board's management contract with MGT/PLE violates § 22-32-109, C.R.S., because it assigns the Local Board's authority to recruit and select staff, and to assign all personnel required to maintain the operations and carry out the educational program of Risley and its authority to determine and implement the instructional program at Risley.

iii. The Local Board has refused to perform acts in which Colorado law enjoins as its duty

C.R.C.P. 106(a)(2) authorizes the district courts of the state to compel a lower judicial body, governmental body, corporation, board, officer or person to perform an act which the law specially enjoins as a duty resulting from an office. The duties the Local Board must perform include, but are not limited to, employing personnel required to maintain the instructional program at Risley, determining and implementing the instructional program to be provided at Risley, and determining the length of time Risley's students will attend school. When the Local Board entered into the April 11, 2019 contract with MGT/PLE, the Local Board manifested a clear intent to fulfill none of those duties; rather, it expressly assigned responsibility for all of these non-delegable functions to a private corporation, in violation of § 22-32-109, C.R.S. and its constitutional duty to exercise control over instruction in its district.

iv. The Local Board repudiated its contractual relationship with PEA, the exclusive bargaining representative of teachers, counselors, and nurses who work at Risley.

Among the fundamental principles contained in the collective bargaining agreement between PEA and the Local Board in this case is that the Local Board recognizes PEA as the sole and exclusive representative of teachers, counselors, and nurses in the School District, including at Risley. The Local Board, through its requests for proposals and eventual contract with MGT, repudiated its obligations under the collective bargaining agreement, at least insofar as they relate to PEA bargaining unit members employed at Risley.

The collective bargaining agreement between PEA and the Local Board governs teacher transfers, among many other terms and conditions of employment. According to that agreement, the "[Local] Board retains the sole and exclusive right to implement transfers[.]" Yet, as alleged in the Complaint, teachers, including plaintiff Donovan, have been interviewed by MGT executives, who will determine which teachers they will agree to retain. Those teachers not retained at Risley will presumably be transferred, or—worse—their employment might be non-renewed—i.e. terminated. Regardless, teachers stand to be removed from their positions by a non-party to the collective bargaining agreement while the Local Board observes from afar, making sure not to "unreasonably withhold" its approval of any decisions MGT/PLE make.

The Local Board will likely argue that there is not repudiation or breach to be found here. In any event, it might claim, PEA has not exhausted its contractual remedies—i.e. by purusing a grievance. Of course, doing so, under these circumstances, would be an exercise in futility. The doctrine of exhaustion of contractual remedies, unlike the doctrine of exhaustion of administrative remedies, is based on the specific provision of a contract, such as a collective bargaining agreement. *Brown v. Jefferson Cnty. Sch. Dist. No. R-1*, 297 P.3d 976, 985 (Colo.

App. 2012) (Taubman, J., dissenting). Both doctrines share the general principle that exhaustion of remedies should be followed, subject to specified exceptions. *Id.* One exception, applicable here, is where the employer's conduct amounts to a repudiation of a collective bargaining agreement. *Jefferson Cnty. Sch. Dist. No. R-1 v. Shorey*, 826 P.2d 830, 845-46 (Colo. 1992).

2. Danger of a Real, Immediate, and Irreparable Injury

Absent a preliminary injunction, irreparable injury will occur. The State Board's November 17, 2018 Order and April 10, 2019 action, as well as the Local Board's contract with MGT/PLE, affect the terms and conditions of employment for plaintiff Donovan and other members of the PEA bargaining unit. Moreover, the Order, action, and contract all affectand PEA's status as the exclusive bargaining representative of the teachers, counselors, and nurses who work at Risley. Given these circumstances, one need not look far for dangers of real, immediate, and irreparable injury.

"Irreparable harm" is a term that courts adapt to the unique circumstances that an individual case might present. *Gitlitz v. Bellock*, 171 P.3d 1274, 1278-79. Generally, the term is understood to mean "certain and imminent harm for which a monetary award does not adequately compensate." *Id.* An injury may be irreparable when monetary damages are difficult to ascertain or where there exists no certain pecuniary standard for the meansurement of damages. *Id.*

Courts have recognized irreparable harm in the loss of collective bargaining rights. *Wing v. City of Edwardsville*, 341 P.3d 607, 613 (Kan. Ct. App. 2014); *see also Hoffman ex rel. N.L.R.B. v. Inn Credible Caterers, Ltd.*, 247 F.3d 360, 369 (2d Cir. 2001). Where actions serve to damage collective bargaining rights such that employees are unable to bargain collectively, or where support for the union they have chosen is discouraged under the circumstances, irreparable harm exists. *Wing*, 341 P.3d at 614; *citing Franks Bros. Co. v. National Labor Relations Board*, 321 U.S. 702, 704 (1944).

Here, the State Board's November Order, its April action approving MGT/PLE, and the contract the Local Board entered into thereafter each serve to damage collective bargaining rights insofar as they obviate PEA's influence over the terms and conditions of employment that exist at Risley. The school's employees, including plaintiff Donovan, are harmed when their chosen bargaining agent is powerless to affect positive change to the terms and conditions under which they are employed.

In addition, the circumstances here present a real and immediate danger that the Local Board will delegate authority to MGT/PLE over Risley's budget, which includes locally-raised funds. Local taxpayers, such as plaintiffs Ethredge and Donovan, did not select MGT/PLE and,

unlike the Local Board, which is subject to periodic elections, MGT/PLE is not accountable to the voters and taxpayers of Pueblo. Once locally-raised funds are spent, neither the plaintiffs here nor anyone else will have a legal recourse for recovery.

Meanwhile, monetary damages related to all of the above dangers are difficult or impossible to ascertain, and there is no certain pecuniary standard to measure the harm that the plaintiffs will suffer.

3. Lack of a Plain, Speedy, and Adequate Remedy At Law

PEA's loss of its right to collectively bargain the working conditions of the Risley employees' terms and conditions of employment "has intrinsic value in and of itself that may not be adequately compensated by monetary damages." *See Gitlitz*, 171 P.3d at 1280. In addition, there would be a "chilling effect on union participation" that damages cannot provide adequate compensation for. *See Wing*, 341 P.3d at 613. Once those terms and conditions are established, there is no legal remedy or process for PEA or an individual who disagrees with them to object or otherwise affect change. The Risley employees' opportunity to establish desireable terms and conditions of employment is at the bargaining table—they have no plain, speedy, and adequate remedy at law to redress undesireable terms and conditions of employment that are established without their input.

4. No Disservice to the Public Interest

The public interest will not be adversely affected should this Court grant the requested preliminary injuntion. In fact, the opposite is true. The public interest will be served by halting the State Board's abuse of power and overreach into matters reserved for local boards of education. Similarly, the public interest will be served by ensuring that, pending a disposition on the merits of this case, the Local Board is not permitted to assign non-delegable functions or otherwise disregard the duties it is accountable to Pueblo's taxpayers and voters to fulfill. Moreover, the public interest will be advanced by placing protection, in the form of a preliminary injunction, around the locally-raised funds which, once spent, will be impossible to recover.

5. Balance of the Equities and Preservation of Status Quo

The balance of equities and status quo will be maintained because the rights of the parties will be preserved pending a final hearing on the merits.

CONCLUSION

For the above-stated reasons, the Plaintiffs respectfully request entry of relief as set forth in this Motion for a Preliminary Injunction and request that this Court grant a Forthwith Hearing pursuant to C.R.C.P. 121, § 1-15, 4, as the disposition in this matter requires immediate attention.

DATED this 10th day of May, 2019.

Respectfully submitted,

/s/ Kris A. Gomez
Kris A. Gomez
Brooke M. Copass
Erik G. Bradberry
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of May, 2019, a true and correct copy of the foregoing **MOTION FOR A PRELIMINARY INJUNCTION** was electronically filed and served via email to the following:

Julie C. Tolleson, Esq.
Colorado Department of Law
States Services Section, Education Unit
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 6th Floor
Denver, Colorado 80203
Julie.Tolleson@coag.gov

Richard Bump, Esq.
Stu Stuller, Esq.
Caplan and Earnest
3107 Iris Avenue, Suite 100
Boulder, CO 80301
bumpr@celaw.com
sstuller@celaw.com

/s/ Bridget Calip
Bridget Calip

EXHIBIT 1

DATE FILED: May 10, 2019 4:18 PM
FILING ID: 6733390E95634
CASE NUMBER: 2019CV30298

STATE OF COLORADO BOARD OF EDUCATION 201 E. Colfax Avenue #506 Denver, CO 80203	BOARD USE
In Re: Accountability Recommendations Heroes Middle School and Risley International Academy of Innovation Pueblo City Schools	CASE NUMBERS: 17-AR-06

ORDER

This matter came back before the Colorado State Board of Education ("State Board") pursuant to the Board's June 16, 2017 Final Written Determinations regarding the above-referenced schools ("Determinations") and in accordance with the Education Accountability Act of 2009 (as amended), §§ 22-11-101 et. seq., C.R.S., (2018). Based on the record of materials submitted to the Board, the information adduced at hearing, the comments of stakeholders, and being duly advised in premises, the State Board ORDERS as follows:

Procedural History

1. Heroes Middle School ("Heroes") and Risley International Academy of Innovation ("Risley") first came before the board for proceedings on Monday, April 24, 2017, pursuant to 22-11-210(5)(b), C.R.S., (2016) and the Colorado State Board of Education's Procedures for State Board Accountability Actions. [1]

2. Heroes came before the board with a significant history of failing to provide a quality education to its students, including school plan types as follows: 2010 – Turnaround, 2011 – Turnaround, 2012 – Turnaround, 2013 –

[1] Case 17-AR-06 originally involved a third school, Bessemer Elementary School. Since the initial proceedings herein, Bessemer achieved a rating of Improvement and therefore is not subject to further proceedings at this time.

Turnaround, 2014 – Turnaround, and 2016 – Priority Improvement.

3. Risley also came before the board with a significant history of failing to provide a quality education to its students, including school plan types as follows: 2010 – Turnaround, 2011 – Turnaround, 2012 – Turnaround, 2013 – Priority Improvement, 2014 – Turnaround, and 2016 – Turnaround.

4. At that time, the State Board reviewed and fully considered the accountability recommendations of the Commissioner, the State Review Panel ("SRP"), and the reports submitted by Pueblo City Schools ("District"), and heard and considered the presentation of the District.

5. On June 16, 2017, the State Board issued its Determinations, finding that Heroes should seek innovation status, Risley should retain innovation status, and that both must engage The Achievement Network ("ANet") as an external management partner. The Order directed that ANet be given "formal, decision-making authority" in a number of specific areas:

> instructional strategies and schedule; assessment choice and schedule; performance management metrics and routines; data-driven practices; school leadership coaching; and staff professional development content, schedules and training.

Heroes Determination p. 4; *Risley Determination* p. 4. The State Board also ordered that the contract require the strengthening of school leadership and community engagement.

6. The Determinations provided that if either school earned a rating of Priority Improvement or Turnaround in 2018 or thereafter and failed to make adequate progress, "the Commissioner shall assign the state review panel to critically evaluate the School's performance, revisit its recommendations, and report back to the State Board consistent with C.R.S. § 22-11-210(5)(a)."

7. The Determinations were not appealed.

Factual Findings

8. On July 1, 2017, Risley and Heroes both entered their 6th year with a Priority Improvement Plan or lower. Since then, their performance history has

been as follows:

Heroes Middle School

a. 2017 – Priority Improvement
b. 2018 (Preliminary) – Priority Improvement

Risley International Academy of Innovation

a. 2017 – Turnaround
b. 2018 (Preliminary) – Turnaround

9. Both Heroes and Risley serve vulnerable student populations, as demonstrated by the following chart:

2016	**Heroes**	**Risley**	**State Average (MS)**
% Minority	71	82	46
% IEP	22	20	11
% FRL	88	98	43

Average daily attendance for both schools is consistently below the state average.

10. Because both Heroes and Risley have continued to earn ratings of Priority Improvement or Turnaround, the SRP was assigned to critically evaluate the schools' performance and make recommendations, as ordered by the Board in 2017. On October 11, 2018, the SRP issued reports regarding Heroes and Risley as follows:

A. The SRP recommended that innovation status be continued at Heroes and Risley because participation in the Innovation Zone has provided professional development for teachers, leadership support, and additional time in the school day for recovery/enrichment classes. The SRP found that Risley's innovation plan has not been fully leveraged to affect significant improvements in student achievement or growth. For example, the innovation plan has the potential to provide the school

waivers that offer flexibility with recruiting and retaining high-quality teachers, support with collective bargaining, and selecting curricula to support the school's unique needs. Accordingly, the SRP recommended that moving forward the school utilize all opportunities available through the innovation plan to maximize its impact.

B. In its report regarding Heroes, the SRP found that "[w]hile the partnership with ANet has been effective in some areas, it has not fulfilled the directive of the State Board." Specifically, instructional support through ANet is only provided to teachers in two content areas (language arts and math), a coach is provided only for a half-day once a week, and leadership development in the areas of turnaround, performance management, and community outreach is not being addressed. Accordingly, the SRP found that the support of another management entity is needed to support leadership development and additional improvement in instruction. The SRP stated the management entity "should have full decision-making authority over scheduling, hiring, performance management, coaching, and supervision of teachers and instructional coaches and responsibility for community outreach and communications."

C. With regard to Risley, the SRP found that ANet does not have full decision-making authority in areas such as school schedules, leadership coaching, and other school operations. The SRP noted that "ANet acknowledged they are not a management partner; their role is specific to providing instructional leadership supports." Accordingly, the SRP recommended that the school be run by "a management entity that has full decision-making authority over all school operations, including (but not limited to): recruiting and retaining high quality staff and leaders; curriculum and instruction; staff supervision; and finances."

D. The SRP did not recommend converting Heroes to a charter school. The SRP strongly considered converting Risley to a charter school, but did not recommend this option because it is not clear that it would result in increased achievement and growth, and because they were recommending full external management. The SRP did not recommend closure of either school because it did not appear to them that there were

better options for middle school students within a reasonable distance.

11. The SRP carefully considered the factors set forth in § 22-11-210(4), C.R.S.

12. Heroes and Risley received substantial extra support in recent years while attempting to improve performance. For example:

A. Heroes was awarded a federally-funded Tiered Intervention Grant (TIG) in 2010 for two academic years for a total amount of $1,190,000. Risley was awarded a TIG for four academic years in a total amount of $2,115,866.

B. Both schools were part of the CDE Turnaround Network from SY16 through SY18. The Turnaround Network is a three-year engagement designed to support schools in Priority Improvement and Turnaround. Schools collaborate with CDE staff to develop a robust improvement plan, engage in intensive professional development, and receive on-going coaching and support. Heroes received $112,000 and Risley received $95,000.

C. CDE staff visited the schools regularly as a part of the Turnaround Network program.

D. The District was awarded a $30,000 Pathways Grant for the 2016-17 and 2017-18 school years to support planning and implementation of the accountability pathways at Heroes.

Despite this support, the schools have been unable to make meaningful improvements for their student populations without further state intervention.

13. While ANet supported the schools in a majority of the areas specified in the Determinations, the SRP found that ANet was not granted formal decision-making authority over performance management, school leadership coaching, and community engagement. Further, as stated in the 2018 SRP progress monitoring recommendation form for Risley, "ANet acknowledged they are not a management partner; their role is specific to providing instructional

leadership supports."

2018 Proceedings

14. Heroes and Risley came back before the board for proceedings on Wednesday, November 14, 2018.

15. As part of its revised process for accountability actions, the State Board accepted and considered public comment. The Board received written comment which included approximately 28 emails from students (and former students), parents, teachers, other district employees, non-profit and community organizations supporting children and families in the communities. One email included names of 141 people supporting it, which focused on a Community School model. The following table shows the breakdown of commenters:

	Risley	Heroes	Both	Pueblo Education Coalition (Community School Letter)
Community Partners	1	3		
Staff	6	4		26
Parents	6			15
Pueblo Education Association			1	
Community Member			1	31
Students (current and previous)	10			66
District Leaders			5	
Unified Improvement Plan Feedback	9			

Although the comments were diverse, several consistent themes emerged.

A. Many of the respondents expressed support for their schools, community and students. A strong sense of community pride in the schools emerged from the comments. It was clear from the comments that there are also many community organizations supporting the holistic needs of students and broader community, beyond the academic needs, especially for Heroes. Many people commented about the music and athletic offerings at Risley.

B. A group of education leaders in the district submitted similar letters supporting the continued work of the Innovation Zone and the involvement of Heroes and Risley in the Zone.

C. Many expressed the desire to keep the schools open and not convert them to charter schools.

D. There was agreement around the need for improvements in both schools, but different opinions about how. There was some support for the work of the Achievement Network, but others voiced concerned, including students who shared their opinions of the regular assessments involved. The email signed by 141 individuals supported the idea of the Community Schools model.

16. The District's submitted materials proposed, among other things, the selection and engagement of a new external manager to address continuing challenges at Heroes and Risley. The District's presentation asked the State Board to "[a]uthorize a more comprehensive management partnership for each school."

17. At the hearing, the District proposed that its board would delegate decision-making authority in the areas identified by the SRP to the management entity. The District also indicated that its local board would be willing to adopt the personnel and staffing recommendations of the external manager. The District, school leadership, and CDE concur that ANet supports are valuable in supporting data-driven instruction, especially in math and language arts, but

that the supports are not enough to satisfy the holistic improvement needs at the schools.

18. After deliberation, the State Board unanimously voted to direct the Office of the Attorney General and Department of Education ("Department") staff to prepare orders for the Board's consideration directing the District to enter into contracts with entities to wholly manage Heroes and Risley for a period of not less than four years.

Legal Conclusions

19. The Board is authorized to take additional action pursuant to the terms of its Written Determinations in 2017. In addition, § 22-11-210(5.5), C.R.S. permits the Board to direct an additional or different action if a public school continues to perform at a priority improvement or turnaround level after the State Board has originally directed an action.

20. Section 22-11-210(5)(a), C.R.S. authorizes the State Board to direct one or more of the following actions concerning Heroes or Risley:

A. That the school be partially or wholly managed by a private or public entity other than the school district;
B. That the school be converted to a charter school;
C. That the school be granted status as an innovation school pursuant to section 22-32.5-104; or
D. That the school be closed.

21. Pursuant to § 22-11-210(5.5), C.R.S., the State Board has considered the statutory criteria in § 22-11-210(4), the recommendations of the SRP, the District's proposed pathway, the actions that the District was previously directed to take, the fidelity with which the District has implemented the directed actions, and whether the amount of time that the District has had to implement the actions is reasonably sufficient to achieve results.

ORDER

WHEREFORE, the State Board orders that the District take action under § 22-11-210(5)(a), C.R.S. with regard to Heroes and Risley as follows:

A. Within 90 days of this Order, the local school board shall use an appropriate selection process to identify, for each school, a public or private entity, other than the District, to wholly manage the schools. The local board shall submit appropriate information regarding its proposed manager to the State Board for approval.

B. At each step in its selection process, the local board shall confer with the Department to ensure that:

- the scope of work for which proposals are solicited aligns to this order;
- the selected manager uses research-based strategies and has a proven track record of success working with schools under similar circumstances; and
- the selected manager is qualified and willing to fulfill the duties identified in the scope of work and in this Order.

The State Board shall vote to approve the District's selected manager(s) based on these factors.

C. Within 30 days of State Board approval of the selected manager(s), the local board shall execute a contract authorizing the selected and approved manager to administer the affairs and programs of the school beginning no later than July 1, 2019, and continuing for a term of not less than four years. At the end of this term, the district board shall have authority to determine whether to renew the management contract.

D. During the term of the contract, the manager shall manage the school(s) in a full-time capacity, and shall report directly to the local board. Through the contract, the local board shall delegate to the manager all authority needed to fully manage each school, subject to the limits of statute and the Colorado Constitution, and applicable case law. This authority shall include, but

not be limited to, the following areas:

1. **Building-level personnel/staffing**. The manager shall have authority over recruitment, selection of staff and assignments of all personnel required to maintain the operations and carry out the educational program of the school.

2. **Professional development and training.** This authority should include selecting and scheduling teacher professional development and mentoring administrators, including by providing coaching around instructional observation and feedback.

3. **Implementing an instructional program.** This authority should include adopting/revising curriculum and assessment systems;

4. **Identifying needs for consulting and professional services.** This authority includes determining whether to retain ANet as a partner;

5. **Revising innovation plans.** The manager shall be responsible for implementation of the schools' innovation plans, including fully leveraging the plans as currently approved and recommending any further waivers needed to optimize student outcomes;

6. **School climate and culture.** The manager shall be authorized to create, change, and guide systems including student referral and discipline, multi-tiered systems of support, PBIS, restorative practice, and training regarding the same;

7. **Budgetary discretion.** The manager shall have authority to manage the school's budget adopted by the local board, including state and federal grant dollars that are

allocated to the school by the local board; and

8. **Other authority.** Such further authority as the manager reasonably needs to create systemic improvement in teaching and learning.

E. Within the 30-day period following State Board approval of the selected management entity (or entities), the local board shall provide a copy of the contract to the Commissioner or her designee, who shall advise the State Board in the event that the contract fails to satisfy the terms of this Order.

F. The State Board understands that the contract may require a provision allowing the local board to terminate the relationship for good cause shown. In the event the local board believes it should terminate its contract with the manager, it must advise the State Board and seek appropriate amendments to this Order, consistent with the State Board's authority under the Accountability Act.

G. For those actions requiring formal action by the local board, the board shall give appropriate consideration to the recommendations of the manager and not unreasonably withhold its approval. If the local board rejects the manager's recommendation, it shall issue a reasoned, written explanation for its action in the form of a board resolution and shall provide CDE with a copy of said resolution within 14 calendar days of board action. If, after reviewing the local board's resolution and supporting materials, CDE believes the local board unreasonably withheld its approval, CDE shall provide notice in writing to the local board of its reasons for that determination and provide the local board 14 calendar days to reconsider. Unreasonable rejection of the manager's recommendations, or a pattern or practice of rejecting the manager's reasonable recommendations, may constitute evidence of noncompliance with this Order.

H. In the event that the local board fails to faithfully and timely comply with this Order, the State Board will promptly reconvene and may take further actions as permitted by law, including conversion of Heroes and/or Risley to a charter school or closing one or both schools.

I. Heroes and Risley shall remain subject to ongoing performance monitoring under § 22-11-210(5.5), C.R.S. The manager should provide regular updates to the State Board regarding the schools' progress. Department staff shall continue monitoring implementation of this Order, including by making unannounced site visits. Department staff will also provide a report on the schools' progress to the local board on a bi-annual basis.

J. In the event that one or both schools improves performance to an plan type of Improvement or higher for two or more consecutive years, or based on the recommendation of the State Review Panel as part of statutory monitoring, or for other good cause shown, the District may apply to the State Board for a modification of this Order, including transitioning certain operational authority back to the local board or otherwise accommodating modification of the management partner contract.

K. This is a final agency action.

Dated this 27th day of November, 2018.

Dr. Angelika Schroeder, Chair
Colorado State Board of Education

CERTIFICATION OF MAILING

I hereby certify that I have provided a true and correct copy of the foregoing **ORDER** this 27th day of November, 2018 via e-mail addressed to the following parties:

Charlotte Macaluso
Superintendent, Pueblo City Schools
charlotte.macaluso@pueblocityschools.us

Barbara Clementi
Board President, Pueblo City Schools
barbara.clementiboe@pueblocityschools.us

Richard E. Bump
Caplan & Earnest LLC
Counsel for Pueblo City Schools
bumpr@celaw.com

Katy Anthes, Commissioner
Colorado Department of Education
Anthes_K@cde.state.co.us

Alyssa Pearson, Deputy Commissioner
Colorado Department of Education
Pearson_A@cde.state.co.us

Brenda Bautsch, Accountability Specialist
Colorado Department of Education
Bautsch_B@cde.state.co.us

Julie C. Tolleson, First Assistant Attorney General
Colorado Department of Law
Counsel for State Board of Education
Julie.Tolleson@coag.gov

Elizabeth Cordial
Director of State Board Relations

EXHIBIT 2

MASTER ENGAGEMENT AGREEMENT BY AND BETWEEN
MGT OF AMERICA CONSULTING, LLC AND
PUEBLO SCHOOL DISTRICT NO. 60

DATE FILED: May 10, 2019 4:18 PM
FILING ID: 6733390E95634
CASE NUMBER: 2019CV30298

THIS MASTER ENGAGEMENT AGREEMENT (the "Agreement"), made and entered into as of April 11, 2019 (the "Effective Date"), by and between MGT of America Consulting, LLC, located at 4320 W. Kennedy Blvd, Tampa, FL 33609 ("MGT") and Pueblo School District No. 60 located at 315 W. 11th Street, Pueblo, CO 81003 ("District"), sets forth the parties' understanding pursuant to which MGT shall be engaged by District.

I. SCOPE OF WORK

MGT shall be responsible and accountable to the District for the administration, operation and performance of Risley International Academy of Innovation ("Risley"), a District school serving grades 6-8. MGT's responsibility is expressly limited by: (a) Risley's budget and staffing as approved and amended from time to time by the District's Board of Education, and (b) the availability of state funding to pay for its services. MGT agrees to wholly manage Risley in a full-time capacity and to report directly to the District's Board of Education ("Board"). As set forth in the Colorado State Board of Education's Order dated November 27, 2018 ("Order"), attached hereto as Exhibit A, the Board shall delegate to MGT all authority needed to fully manage Risley, subject to the limits of statute and the Colorado Constitution, and applicable case law. Per the Order, MGT's authority and responsibility includes, but is not limited to, the following areas:

1. **Building-level personnel/staffing.** The manager shall have authority over recruitment, selection of staff and assignments of all personnel required to maintain the operations and carry out the educational programs of the school; additionally, the manager shall supervise and evaluate the building principal;
2. **Professional development and training.** This authority should include selecting and scheduling teacher professional development and mentoring administrators, including by providing coaching around instructional observation and feedback;
3. **Implementing an instructional program.** This authority should include adopting/revising curriculum and assessment systems;
4. **Identifying needs for consulting and professional services.** This authority includes determining whether to retain ANet as a partner;
5. **Revising innovation plans.** The manager shall be responsible for implementation of the schools' innovation plans, including fully leveraging the plans as currently

approved and recommending any further waivers needed to optimize student outcomes;

6. **School climate and culture.** The manager shall be authorized to create, change, and guide systems including student referral and discipline, multi-tiered systems of support, PBIS, restorative practice, and training regarding the same;
7. **Budgetary discretion.** The manager shall have authority to manage the school's budget adopted by the local board, including state and federal grant dollars that are allocated to the school by the local board; and
8. **Other authority.** Such further authority as the manager reasonably needs to create systemic improvement in teaching and learning.

For those actions requiring formal action by the Board, the Board will give appropriate consideration to the recommendations of MGT and will not unreasonably withhold its approval.

MGT shall provide regular updates to the District's Board and to the State Board regarding the school's progress. MGT shall cooperate with site visits by staff from the Colorado Department of Education.

MGT shall provide educational programs that meet federal, state and local requirements, and the requirements imposed by the Agreement, unless such requirements are waived. The Board shall interpret federal, state and local requirements liberally to give MGT flexibility and freedom to implement its educational and management programs.

MGT agrees to timely notify the Board of any anticipated or known: (1) material health or safety issues, (ii) labor, employee or funding problems, or (iii) problems of any other type that could adversely affect the District in complying with its responsibilities under the Agreement, applicable law or the Order.

The specific scope of work of MGT's services hereunder (the "Services") shall be set out in Annexes to this Agreement. Each Annex, upon execution by both parties, shall by this reference be incorporated in and made part of this Agreement. In the event of any conflict between the terms of the Annexes and this Agreement, this Agreement shall control. Each Annex shall specify the services to be performed by MGT, key MGT staff members assigned to assist in the performance of such Services and the payment terms for such Services, as well as any other details specified by the parties. Should the parties mutually agree to change in any material way the Services as described in any Annex, an adjustment to MGT's fees and promised delivery dates for such Services may be required. MGT undertakes to advise District

promptly should any such adjustment be necessary and to negotiate with District in good faith to arrive at a mutually acceptable revision to the applicable Annex.

II. STAFFING

MGT shall assign such staff members as identified in the applicable Annex to perform the Services. Should any of the employees listed in an Annex be unable to perform the Services, MGT may substitute another similarly qualified staff member, subject to the District's consent, which shall not be unreasonably withheld. MGT may, from time to time and in its discretion, augment the listed staff as needed to perform the Services.

III. STANDARDS

MGT shall perform all Services in a diligent, safe, and workmanlike manner, using its best skill and judgment pursuant to the highest standards of the profession for the Services. MGT represents that the work performed will be in conformance with all applicable laws, statutes, rules, regulations, ordinances, codes and orders of any governmental bodies, agencies, authorities and courts. If MGT's performance does not conform to such standards and the District notifies MGT of same, MGT agrees to immediately take all action necessary to remedy the nonconformance. Any costs incurred by MGT to correct such nonconformance shall be at MGT's sole expense.

IV. FEES AND DISBURSEMENTS

MGT shall provide the Services for the professional fees set forth in the applicable Annex. Unless otherwise expressly stated in this Agreement, all necessary labor, licenses, materials, supplies, equipment, reimbursables, and other items necessary to complete the Services shall be part of and not in addition to the professional fees set forth in the applicable Annex.

All payments shall be paid upon receipt of the invoices, which shall be issued no more than once every thirty (30) days. Payment shall be made by direct deposit by electronic funds transfer to the financial institution designated by MGT in writing.

V. INDEPENDENT CONTRACTOR

MGT understands and acknowledges that this Agreement is a contract for services and that an employee-employer relationship does not exist between MGT and the District. MGT

shall perform all Services using its judgment and expertise as an independent contractor and not as an employee of the District. Neither MGT nor any agent or employee of MGT shall be an agent or employee of the District nor shall any of them have any authority, express or implied, to bind the District to any agreement or incur any liability or obligation attributable to the District. **MGT acknowledges that it is not entitled to workers' compensation or other benefits from the District and that MGT is obligated to pay federal and state income tax on any moneys earned from the District pursuant to this Agreement.**

VI. USE OF WORK PRODUCT AND INFRINGEMENT CLAIMS

To the extent MGT creates any work product, including without limitation, MGT's notes, memoranda, photographs, spreadsheets, drawings, reports, data, submittals, and designs or plans or similar materials relating to the Services (collectively "Work Product"), the Work Product shall be delivered to the District upon the earlier to occur of the completion of the Services, termination of this Agreement by either party or material breach of this Agreement by MGT. Work Product shall become the property of the District and may be used by the District for any purpose. MGT shall defend and indemnify District from and against all suits, causes of action, or claims for infringement of any alleged patent rights, copyright, or trade secrets arising out of District's ownership or use of MGT's Work Product and shall indemnify the District from loss or liability on account thereof and shall pay any judgments or fees resulting therefrom, including, but not limited to, royalties, license fees, and attorneys' fees.

VII. SPECIAL PROVISIONS

Items checked in this Section are hereby incorporated into this Agreement as terms thereof:

☐ **Workers Compensation Insurance** shall be maintained to comply with Colorado statutory provisions, including any required flow down, occupational disease provisions for all employees per statutory requirements, and employer's liability, which must have limits of at least: $100,000 per accident, $100,000 disease, each employee and $500,000 accident/disease policy limit. Such policy shall contain a waiver of subrogation in favor of the District. MGT shall also require each subcontractor to furnish workers' compensation insurance, including occupational disease provisions for all of the latter's employees, and to the extent not furnished, MGT accepts full liability and responsibility for subcontractors' employees.

☐ **Professional Liability Insurance** shall be maintained with coverage limits for each occurrence or claim of $2,000,000, if professional services are provided under this Agreement.

☐ **Comprehensive General Liability Insurance** shall be maintained to protect MGT from all claims for bodily injury, including death and all claims for destruction of or damage to property, including loss of use therefrom, arising out of or in connection with any operations under this Agreement, whether such operations be by MGT or by any subcontractor under it or anyone directly or indirectly employed by MGT or by a subcontractor. All such insurance shall be written with limits and coverages as specified below and shall be written on an occurrence form:

General Aggregate $2,000,000
Products - Completed Operations Aggregate $2,000,000
Each Occurrence $1,000,000
Personal Injury $1,000,000

This policy shall be primary insurance, and any insurance carried by the District, its officers, or its employees, or carried by or provided through any insurance pool of the District, shall be excess and not contributory insurance to that provided by MGT.

☐ **Comprehensive Automobile Liability Insurance** shall be maintained including coverage for liability arising out of any auto (including owner, hired, and non-owned autos), and including coverage for all power mobile equipment used by MGT on District property, with a combined single limit of $1,000,000/person, $1,000,000/accident, and $1,000,000/property damage. Such insurance shall include a waiver of subrogation in favor of the District. This policy shall be primary insurance, and any insurance carried by the District, its officers, or its employees, or carried by or provided through any insurance pool of the District, shall be excess and not contributory insurance to that provided by MGT.

☐ **Certificates of Insurance** must be submitted to the District before starting work. Insurance certificates must show coverage of all checked insurance requirements, must contain an endorsement naming the District, the District's officers, board members and employees as additional insureds. All coverages required herein shall be continuously maintained through the Term of this

Agreement, including any warranty periods, to cover all liability, claims, demands, and other obligations assumed by MGT pursuant to Section 9(b) of this Agreement. If the expiration date of the insurance certificate is prior to final completion, MGT shall provide a new certificate of insurance prior to thirty (30) days from the expiration of the current policy. In case of any claims made policy, the necessary retroactive dates and extended reporting periods shall be procured to maintain such continuous coverage. MGT shall require that all of its agents and subcontractors also comply with these insurance requirements. Any and all deductibles or self-insured retentions contained in any insurance policy shall be assumed by and at the sole risk of MGT.

☐ **Sales and Use Taxes.** The District is exempt from the payment of any state, and most municipal, sales and use taxes for materials, supplies, and equipment used in the performance of Services. MGT shall not include any of these taxes in any charges or invoices to the District.

☐ **Background Investigations and Finger Printing.** Any employee, contractor, agent or other representative of MGT whether or not in paid status must agree to be finger printed and submit for a background investigation if that MGT and/or employee, contractor, agent or other representative of MGT will provide direct services to District students or will have unsupervised access to any District student while performing the Services under this Agreement. In its sole discretion, the District may conduct a short-form background check of any employee, contractor, agent or representative of MGT who will have access to a school building while students are present and who thereby may have incidental contact with students while performing the Services in accordance with its volunteer policy. If needed and requested by District, MGT agrees to provide District with the dates of birth and social security numbers of its employees, contractors, agents or representatives in order to conduct this more informal background check.

VIII. TERM AND TERMINATION

This Agreement shall be effective from July 1, 2019("Effective Date") through June 30, 2023 (the "Expiration Date"), subject to earlier termination and appropriations as provided herein. District may not terminate the Contract pursuant to this Section before July 1, 2020. On or after July 1, 2020, this Contract may be terminated, in whole, for any good cause reason the District determines in its sole discretion is in its best interest. MGT shall not terminate this

Agreement, without the written consent of the District, other than for nonpayment. Termination of services shall be affected by delivery to MGT of a Termination Notice at least ninety (90) days prior to the termination effective date, specifying the date on which such termination is to become effective. MGT shall be paid any and all payments due through the termination effective date. The District will conduct an audit to determine MGT's reasonable costs expended to the date of cancellation, or the District may determine MGT's cost based on a schedule of values or exact cost of any work performed. MGT will not be reimbursed for any anticipated profit. In the event of termination, MGT shall deliver to the District all Work Product.

IX. GENERAL PROVISIONS

A. Insurance Requirements

Notwithstanding any other provision of this Agreement, failure on the part of MGT to procure or maintain policies providing the required coverages, conditions, and minimum limits shall constitute a material breach of this Agreement for which the District may immediately terminate this Agreement or, at its discretion, the District may procure or renew any such policy or any extended reporting period thereto and may pay any and all premiums in connection therewith, and all money so paid by the District shall be repaid by MGT to the District upon demand, or the District may offset the cost of the premiums against any money due to MGT from the District. Any and all deductibles or self-insured retentions contained in any insurance policy shall be assumed by and at the sole risk of MGT.

B. Licenses, Taxes, Permits, and Fees

MGT shall obtain, at its own expense, all licenses and permits and pay all applicable taxes and fees, in the execution of the terms of this Agreement, including but not limited to excise tax, federal and state and local income taxes, payroll and withholding taxes, unemployment taxes, and worker's compensation payments for its employees, and shall indemnify and hold the District harmless for all claims arising under such taxes and fees.

C. General Indemnification

MGT agrees to indemnify, hold harmless and defend District, its agents, servants, volunteers, and employees from any and all claims, judgments, costs, and expenses

including, but not limited to, reasonable attorney's fees, reasonable investigative and discovery costs, court costs and all other sums which District, its agents, servants and employees may pay or become obligated to pay on account of any, all and every claim or demand, or assertion of liability, or any claim or action founded thereon, arising or alleged to have arisen out of the products, goods or services furnished by MGT, its agents, servants or employees; the equipment of MGT, its agents, servants or employees while such equipment is on premises owned or controlled by District; or the negligence of MGT or the negligence of MGT's agents when acting within the scope of their employment, whether such claims, judgments, costs and expenses be for damages, damage to property including District's property, and injury or death of any person whether employed by MGT, District or otherwise.

The parties understand that under Colorado law, except in very limited circumstances, a public entity cannot indemnify a private entity. Accordingly, only to the extent permitted under Colorado law, District shall indemnify MGT and its present and former officers, directors, employees and agents (collectively, "Indemnitees") against any loss or expense (including, without limitation , attorneys' fees) which any Indemnitee may incur as the result of any claim, suit or proceeding made or brought against such Indemnitee or in which such Indemnitee is asked to participate, based upon any materials MGT prepares, publishes or disseminates for District and based upon information provided or approved by District prior to its preparation, publication or dissemination, as well as any claim or suit arising out of the nature or use of District's products or services or any Indemnitee's relationship with District, except for losses or expenses that result from any Indemnitee's negligence or willful misconduct.

D. Nondisclosure of Confidential Information

MGT will not disclose to any third person or entity any records or writings of the District, its employees or students, regardless of the form, that are protected by state or federal law and that may come into MGT’s possession.

MGT shall ensure that it, its officers, employees and agents only use such confidential information in order to perform the Services, and shall not without District's prior written consent, disclose such information to any third-party nor use it for any other purpose; provided, however, that MGT shall have the right to disclose District's name and the general nature of MGT's work for District in pitches and business proposals.

The above obligations of confidentiality shall not apply to the extent that MGT can show that the relevant information:

i) was at the time of receipt already in MGT's possession;

ii) is, or becomes in the future, public knowledge through no fault or omission of MGT;

iii) was received from a third-party having the right to disclose it; or

iv) is required to be disclosed by law.

E. Force Majeure

Neither party shall be liable to the other party for any loss or damage of any kind or for any default or delay in the performance of its obligations under this Agreement (except for payment obligations) if and to the extent that the same is caused, directly or indirectly, by fire, flood, earthquake, elements of nature, epidemics, pandemics, quarantines, acts of God, acts of war, terrorism, civil unrest or political, religious, civil or economic strife or any other cause beyond a party's reasonable control.

F. Exclusion of Liability caused by Political or Regulatory Decisions

While District has engaged MGT to assist it in dealing with certain regulatory or political decisions or actions that may adversely affect District's operations, and while MGT has agreed to provide such assistance, MGT cannot be held responsible for and cannot be held liable to District for any loss, damage, or other adverse consequence that may result from any regulatory or political decision or action being rendered against District or District's interests.

G. Governing Law and Venue

This agreement shall be governed by and construed and interpreted in accordance with the laws of the state of Colorado (irrespective of the choice of laws principles of the state of Colorado) as to all matters, including matters of validity, construction, effect, enforceability, performance and remedies. Venue for any dispute concerning the Agreement shall be exclusively in the federal court located in Colorado or the state court located in Pueblo County, Colorado.

H. Dispute Resolution Procedure

1. In the event of a dispute, controversy or claim by and between District and MGT arising out of or relating to this Agreement or matters related to this Agreement, the parties will first attempt in good faith to resolve through negotiation any such dispute, controversy or claim. Either party may initiate negotiations by providing written notice in letter form to the other party setting forth the subject of the dispute and the relief requested. The recipient of such notice will respond in writing within five (5) business days with a statement of its position on, and recommended solution to, the dispute. If the dispute is not resolved by this exchange of correspondence, then senior management representatives of each party will meet at a mutually agreeable time and place within fifteen (15) business days of the date of the initial notice in order to exchange relevant information and perspectives and to attempt to resolve the dispute. If the dispute is not resolved by these negotiations, the matter will be submitted to the Judicial Arbiter Group in Denver, Colorado or other mutually agreeable independent mediation service. The mediation shall take place in Pueblo, Colorado, unless agreed otherwise. The parties understand that none of the above offers made on behalf of the District can be binding as the District is governed by a board which is subject to Colorado's sunshine law. Therefore, the parties understand that should any such offers be made, such offers are made subject to the consideration and possible approval or disapproval by the governing board of the District at a public meeting and in accordance with Colorado's sunshine law. Except as provided herein, no civil action with respect to any dispute, controversy or claim arising out of or relating to this Agreement may be commenced until the matter has been submitted for mediation. Either party may commence mediation by providing to the other party a written request for mediation, setting forth the subject of the dispute and the relief requested. The parties will cooperate in selecting a mediator and in scheduling the mediation proceedings. The parties will participate in the mediation in good faith and will share equally in its costs. The District may elect to pursue litigation for any dispute arising under this Agreement at any time. Mediation may continue after the commencement of a civil action, if the parties so desire. The provisions of this clause may be enforced in court.
2. As required by the Order, the parties acknowledge that for those actions requiring formal action by District's Board of Education ("Board"), the Board

shall give appropriate consideration to the recommendations of MGT and not unreasonably withhold its approval. If the local board rejects MGT's recommendation and the issue is not otherwise resolved by the dispute resolution process in this Section, then the Board shall issue a reasoned, written explanation for its action in the form of a board resolution and shall provide the Colorado Department of Education ("CDE") with a copy of the resolution within 14 calendar days of board action.

I. Limitation of Liability

Notwithstanding anything else herein to the contrary, both parties mutually and forever waive the right to recover any consequential, incidental, indirect, special or punitive damages, including, without limitation, loss of future revenue, income or profits, in any legal proceeding(s) arising out of or relating to this Agreement. This waiver shall apply to legal actions sounding in both contract and tort and shall apply whether or not the possibility of such damages has been disclosed in advance or could have been reasonably foreseen. This provision shall not be interpreted to mean that, absent this provision, either party would have the right to recover any such damages.

J. Undocumented Worker

MGT certifies that it shall comply with the provisions of C.R.S. § 8-17.5-101 *et seq.* MGT shall not knowingly (i) employ or contract with an undocumented worker to perform work under this Agreement, (ii) enter into a contract with a subcontractor that knowingly employs or contracts with an undocumented worker to perform work under this Agreement, or (iii) enter into a contract with a subcontractor that fails to contain a certification to MGT that the subcontractor shall not knowingly employ or contract with a subcontractor that fails to contain a certification to MGT that the subcontractor shall not knowingly employ or contract with an undocumented worker to perform work under this Agreement.

K. Compliance with Law and District Policy

MGT shall abide by all laws, ordinances, rules, regulations, and orders of all governmental agencies or authorities having jurisdiction over the Services. MGT shall abide by all District policies and procedures, including without limitation, those related to the prohibited use and/or possession of alcohol, tobacco or firearms on District grounds. MGT shall at all times strictly enforce this prohibition among its own

employees, agents or subcontractors and their employees, agents or subcontractors. The safety and health of MGT, MGT's employees and agents brought on District property, will be the sole responsibility of MGT.

L. Assignment

Neither party may assign any of its rights or delegate any of its duties or obligations under this Agreement without the express written consent of the other party. Notwithstanding the foregoing, MGT, or its permitted successive assignees or transferees, may assign or transfer this Agreement or delegate any rights or obligations hereunder without consent: (i) to any entity controlled by, or under common control with MGT, or its permitted successive assignees or transferees; or (ii) in connection with a merger, reorganization, transfer, sale of assets or change of control or ownership of MGT, or its permitted successive assignees or transferees.

M. Partial Invalidity

In the event that any provision of this Agreement shall be declared illegal or invalid for any reason, said illegality or invalidity shall not affect the remaining provisions hereof, but such illegal or invalid provision shall be fully severable and this Agreement shall be interpreted and enforced as if such illegal or invalid provision had never been included herein.

N. Notices

All notices required or permitted to be given pursuant to this Agreement shall be deemed given, if and when personally delivered, delivered by fax, with receipt confirmed, or courier or by overnight mail delivery, in writing to the party or its designated agent or representative at the address stated in the first paragraph of this Agreement or at another address designated by the party.

MGT of America Consulting, LLC
4320 W. Kennedy Blvd
Tampa, FL 33609

Attention: Louise Lopez, EVP Finance and Accounting

If to District:
Pueblo School District No. 60
315 W. 11th Street
Pueblo, CO 81033

Attention: Charlotte Macaluso, Superintendent

O. Counterparts and Execution

This Agreement and any Annexes may be executed in counterparts, each of which when so executed shall be deemed an original and all of which together shall constitute one and the same instrument. The counterparts of this Agreement may be executed by electronic signature and delivered by facsimile, scanned signature, or other electronic means by any of the parties to any other party and the receiving party may rely on the receipt of this Agreement so executed and delivered as if the original had been received.

P. Survival

Sections IX.C., IX.D. and IX.H. of this Agreement and the payment obligations described in the Annex(es) shall continue notwithstanding the termination or expiration of the Agreement or any Annex(es).

Q. No Third-Party Beneficiaries

It is expressly understood and agreed that the enforcement of all terms and conditions of this Agreement and all rights and actions relating thereto shall be strictly reserved to the parties, and nothing herein shall give or allow any claim or right of action to or by any other person or third person to this Agreement.

R. <u>Appropriation</u>

Nothing herein shall constitute a multiple fiscal year obligation pursuant to Colorado Constitution Article X, Section 20. Notwithstanding any other provision of this Agreement, the financial obligations of the District under this Agreement are subject to annual appropriation by the governing body of the District.

S. Entire Agreement

This Agreement and attached Annex(es) constitute the entire and only agreement between the parties respecting the subject matter hereof. Each party acknowledges that in entering into this Agreement it has not relied on any representation or undertaking, whether oral or in writing, save such as are expressly incorporated herein. Further, this Agreement may be changed or varied only by a written agreement signed by the parties. Any purchase order provided by the District will be limited by, and subject to, the terms and conditions of this Agreement. Additional or contrary terms, whether in the form of a purchase order, invoice, acknowledgement, confirmation or otherwise, will be inapplicable, and the terms of this Agreement will control in the event of any conflict between such terms and this Agreement.

T. Immunities

The District retains all of its rights, immunities, and protections provided under the Colorado Governmental Immunity Act, C.R.S. § 24-10-101 *et seq*.

[Signature page follows this page]

IN WITNESS WHEREOF, the parties hereto have executed this Master Engagement Agreement as of the date first above written.

AGREED TO AND ACCEPTED:

MGT OF AMERICA CONSULTING, LLC

Signature

_____

Date:_____

PUEBLO SCHOOL DISTRICT NO. 60

Signature

_____

Date: _____

Approved as to form:

_____

Richard Bump, Caplan and Earnest LLC
Attorneys for Pueblo School District No. 60

EXHIBIT 2

ANNEX NO. 1
TO MASTER ENGAGEMENT AGREEMENT DATED
AS OF APRIL 11, 2019

This Annex No. 1 (this "Annex") to the Master Engagement Agreement (the "Agreement") by and between MGT of America Consulting, LLC (“MGT”), and Pueblo School District No. 60 ("District“), sets forth the parties' understanding pursuant to which MGT shall provide the below-specified Services to District.

I. SCOPE OF WORK

See Section I, Page 1 of the Agreement.

II. DELIVERABLES

Those items produced or provided by MGT as outlined in Section 1-8 under Scope of Work.

III. STAFFING

The following MGT staff members shall be assigned to assist in the performance of the above Services:

Colorado Project Manager: Dr. Harry Bull
Risley International On-Site Project Manager: Dr. Babette Moreno
Risley International Math Coach: 2 Partner Mathematics Consulting – Ms. Renee Reyes Garcia
Risley International ELA Coach: Ms. Sandra Damm
Leighann Lenti – University of Virginia Partners in Leadership Program

MGT may assign additional staff members as needed to address Agreement Scope. Staff assignments may reasonably change throughout Agreement term based on conditions required to achieve District objectives.

Upon execution by the parties, this Annex to the Master Engagement Agreement is incorporated by reference in and subject to the terms and conditions set forth in the Agreement.

AGREED TO AND ACCEPTED:

MGT OF AMERICA CONSULTING, LLC

Signature

_____

Date: _____

PUEBLO SCHOOL DISTRICT NO. 60

Signature

_____

Date: _____

Approved as to form:

_____

Richard Bump, Caplan and Earnest LLC
Attorneys for Pueblo School District No. 60

EXHIBIT 2

ANNEX NO. 2
TO MASTER ENGAGEMENT AGREEMENT DATED
AS OF APRIL 11, 2019

This Annex No. 2 (this "Annex") to the Master Engagement Agreement (the "Agreement") by and between MGT of America Consulting, LLC (“MGT”), and Pueblo School District No. 60 ("District“) sets forth the parties' understanding pursuant to which MGT shall provide Services to the District in accordance with the following Budget and Compensation.

I. BUDGET AND COMPENSATION

The base budget and compensation for the 2019-2020 fiscal year is $346,040.00, as more fully set forth in the attachment to this Annex No. 2. This amount shall include178 days of on-site support as listed in the attachment to be provided from August 2019 through May 2020. In addition, between the Effective Date of the Agreement (April 11, 2019) and July 1, 2019, MGT will also provide six (6) days of on-site Executive Manager/Leader support (Dr. Harry Bull or Dr. Babette Moreno) without additional cost to the District on days that are mutually agreed to by the parties. The first of these days is currently anticipated to be April 16, 2019.

The District will also purchase 16 additional days of Executive Manager/Leader support during the 2019-2020 fiscal year to be provided by MGT on-site at the rate of $2,600.00 per day for a total of $41,600.00, which amount is inclusive of all other costs, expenses or reimbursements. The additional 16 days of on-site support will be provided between the Effective Date and the end of the current 2019-2020 school year on school days that are mutually agreed by the parties.

At request of the District, MGT also agrees to provide on-site executive leadership coaching support and services at the rate of $2,600.00 per day, inclusive of all other costs, expenses, or reimbursements. The parties agree to coordinate the dates for these services in advance to assure the availability of MGT personnel.

At request of the District, MGT also agrees to provide on-site academic consultant support services (literacy or math coaching or professional development for teachers) at the rate of $1,600.00 per day, inclusive of all other costs, expenses, or reimbursements. The parties agree to coordinate the dates for these services in advance to assure the availability of MGT personnel.

Without further approval by the District, as provided by law and district policies, the total budget and compensation, including the discretionary support that may be requested by the District above, shall not exceed a total of $424,000.00 during the remainder of the 2018-2019 fiscal year and the 2019-2020 fiscal year combined.

Upon execution by the parties, this Annex No. 2 to the Master Engagement Agreement is incorporated by reference in and subject to the terms and conditions set forth in the Agreement.

AGREED TO AND ACCEPTED:

MGT OF AMERICA CONSULTING, LLC

Signature

_____

Date:_____

PUEBLO SCHOOL DISTRICT NO. 60

Signature

_____

Date: _____

Approved as to form:

_____

Richard Bump, Caplan and Earnest LLC
Attorneys for Pueblo School District No. 60

COST PROPOSAL PER SCHOOL FOR ALL SERVICES
INCLUDING 184 DAYS OF ON-SITE SUPPORTS

	Milestones and Tasks		Project Budget
SPRING 2019	1.0	Project Initiation*	$11,000
	2.0	Data Review*	$18,000
	3.0	Resource Inventory, Assessment, and Mapping*	$21,000
	4.0	Additional Executive Manager Days* (@ $2,600 Day)= (16 Days)	$41,600
FALL 2019	5.0	<u>On Site Supports (178 days)</u>: **Colorado Director**: 10 days **Leadership EM**: 84 days **Math Coach**: 42 days **Literacy Coach**: 42 days	$278,040
		Aug 2019-May 2020 UVA-PLE $36,000 ● District Readiness Assessment Fall 2019: ($20,000) ○ **3** days on site in Pueblo City and one debrief phone call ● Multiple virtual consultations (~**4**) to build Implementation Plan over winter 2019-early spring 2020 ● District boot camp March 2020 ($5,000/participant – recommend 4) ○ **4** days on site in Charlottesville, VA ● Competency Based Leadership Development (Behavior Event Interviews) spring 2020 (can be pre or post boot camp) ○ **4-5** days on site in Pueblo City, CO ● Embedded, tailored support and spring launch visit May 2020 ($6,000) ○ **1** day on site in Pueblo City	
	6.0	Community Stakeholder Engagement and Facilitation	$18,000
		Total Inclusive all of Professional Fees and Expenses	**$387,640**

*Completed Spring of 2019 (April-June 30). Includes 6 days of Executive Management (on site)